No. 82-1066

IN THE

Supreme Court of the United States

October Term, 1982

United States of America, *Appellant*,

v.

Harry Ptasynski, *et al.*, *Appellees*.

On Appeal From The United States District Court For The District Of Wyoming

MOTION OF TAXPAYER AND ASSOCIATION APPELLEES TO AFFIRM

Harold B. Scoggins, Jr.*
Independent Petroleum
Association of America
1101 16th Street, N.W.
Washington, D.C. 20036
(202) 857-4731
Attorney for Association Appellees

OF COUNSEL:

Dr. Frank Conklin
17605 E. Montgomery
Green Acres, WA 99106

Gary Randall
Professor of Law
Gonzaga University
Box 3528
Spokane, WA 99220

William H. Brown
Michael J. Sullivan
Brown, Drew, Apostolos,
Massey and Sullivan
500 Petroleum Building
Casper, Wyoming 82601

Stephen F. Williams
Robert Nagel
Professors of Law
University of Colorado
School of Law
Campus Box 401
Boulder, Colorado 80309

Michael Boudin*
Leonard R. Stein
1201 Pennsylvania Avenue, N.W.
P. O. Box 7566
Washington, D.C. 20044
(202) 662-5286
Attorneys for Taxpayer Appellees

**Counsel of Record*

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QUESTIONS PRESENTED

1. Whether an excise tax on domestic crude oil, which is specifically framed to apply throughout the United States except to geographically defined areas of Alaska, violates the Uniformity Clause (Article I, Section 8, Clause 1) of the Constitution, which requires that "Excises shall be uniform throughout the United States." Art. I, § 8, Cl. 1.

2. Assuming the tax to be unconstitutional, whether the proper remedy is to sever the invalid tax in its entirety from the Internal Revenue Code so that Congress can frame new and uniform legislation of its own design or whether, as the defendant contends, this Court should itself rewrite the tax to extend it to the Congressionally exempted areas of Alaska.*

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*Although no such listing is required in the responsive motion, it is noted that the names of all parties in the Court whose judgment is being sought to be reviewed are set forth in the caption of the District Court opinion (J.S., 1a). None of the corporate parties has a parent company, subsidiary (other than a wholly-owned subsidiary) or affiliate.

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Taxpayer and Association appellees, pursuant to Rule 16 of the Rules of the Supreme Court, move that the final judgment of the District Court be summarily affirmed. The questions presented by the Government are so insubstantial as not to need further argument; summary affirmance will promptly provide a clear legal basis for planning by Congress and taxpayers alike.

STATEMENT

I. The Tax And The Alaska Exemption

The Government's Jurisdictional Statement (J.S., 2-5) adequately describes the general features of the tax imposed by Title I of the Crude Oil Windfall Profit Tax Act of 1980, Pub. L. No. 96-223, 94 Stat. 229 (hereinafter referred to as the "Tax" or the "Windfall Profit Tax"). Its basic structure is succinctly depicted in the chart contained in the District Court's opinion. 550 F. Supp. 549 (reprinted at J.S., App. A, 3a).

The tax is specifically identified by Congress as an excise tax. See 26 U.S.C. Section 4986(a). It is levied, at rates ranging as high as 70%, on "windfall profits" (as defined in a technical statutory formula) from production of oil in 49 states and parts of Alaska. However, contrary to the Constitution, the Tax is *not* "uniform throughout the United States." Art. I, § 8, cl. 1.

The Act provides an exemption for oil produced in an area constituting approximately three-fourths of the State of Alaska.[1] Although the Act contains several exemptions, the Alaska exemption is the only one based upon the geographic location where the oil is produced.[2] "Exempt Alaskan oil" is defined as certain oil produced

> (1) from a reservoir from which oil has been produced in commercial quantities through a well located north of the Arctic Circle, or
>
> (2) from a well located on the northerly side of the divide of the Alaska-Aleutian Range and at least 75 miles from the nearest point on the Trans-Alaska Pipeline System.

Section 4994(e).[3] Crude oil produced from that part of the Sadlerochit reservoir located in the Prudhoe Bay oil field is, however, excluded from the exemption. Sections 4994(e), 4996(d)(3).

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[1] *See* map at App. A. While Defendant repeatedly refers to the exemption as an "Arctic" exemption or "North Slope" exemption and strongly implies that only the area north of the Arctic Circle (approximately ¼ the total area of Alaska) is exempt, the area of the exemption encompasses about ¾ of the State of Alaska, including most of the area below the Arctic Circle.

[2] The governmental, charitable and Indian exemptions are based upon the identity of the owners of the production. See Sections 4994(a), (b) and (d). The "front-end tertiary oil" exemption is based on the producer's use of the proceeds to finance expensive tertiary production. See Section 4994(c).

[3] The Technical Corrections Act of 1982, Pub. L. No. 97-448, 96 Stat. 2365, makes certain technical clarifying amendments in the

The scope of the exemption is vast—not only in area but also in potential oil production sheltered from tax. Official reports of the United States Geological Survey estimate that by 1986 production from *a single field* in the exempt region (the Kuparuk River field) will equal 250,000 barrels of oil per day. 1982 Annual Report on Alaska's Mineral Resources, Geological Survey Circular 884 (1982). If that field were a separate state, such production would entitle it to rank seventh among the oil-producing states, behind only Texas, Louisiana, Oklahoma, California, Wyoming and the non-exempt portions of Alaska. The proven reserves of the Kuparuk River field, however, equal only seven percent of the estimated potential reserves attributable to the exempt area.[4]

Without the Alaska exemption, the Windfall Profit Tax could not have obtained Congressional approval in anything remotely resembling its present form. *All* the seriously considered bills in one form or another exempted Alaskan oil. President Carter's proposal (H.R. 3919, 96th Cong., 1st Sess., § 2) and the House and Senate bills all expressly exempted substantial areas of Alaska. The Senate Finance Committee bill exempted all newly discovered oil. See S. Rep. 394, 96th Cong., 1st Sess. 42-43 (1979), *reprinted at* 1980 U.S. Code and Ad. News 410, 452-53.[5] Not only did every serious proposal

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language of the exemption, none of which is relevant to this appeal. The amended Section 4994(e) is set forth in App. B, *infra*.

[4] Estimated undiscovered reserves in the exempt area are 17.2 billion barrels, which is 21% of such reserves for the entire United States. Proven reserves in the exempt area are 8.5 billion barrels, of which 17.6% or 1.5 billion barrels are in the Kuparuk River field. Geological Survey Circular 860, U.S.G.S. (1982).

[5] This exemption effectively sheltered from tax all Alaskan production covered by the ultimately adopted Alaska exemption, and then some. This is so because the only Alaskan oil failing to qualify for the Committee's newly discovered oil exemption was Sadlerochit oil in Prudhoe Bay (which was denied exemption in the final act, see Sections 4994(e), 4996(d)(3)).

effectively exempt Alaskan oil, but the adoption by the Senate of an explicit Alaskan exemption was critical both to the Senate's decision to extend the tax to newly discovered oil and to its resolution of the stalemate in which the tax bill had become trapped.[6]

II. Proceedings Below

Taxpayer appellees[7] brought suit seeking refunds of Windfall Profit Taxes paid on the grounds that the Tax is unconstitutional in violation of both the Uniformity Clause (Article I, Section 8, Clause 1) and the Fifth Amendment prohibitions against taking of property without due process of law and against the taking of property for a public use without just compensation.[8]

The association appellees[9] also joined as plaintiffs below. The largest of these associations is the Independent Petroleum Association of America (IPAA), a national organization of independent domestic oil producers who are subject to the Tax. The remaining 30 associations are national, state or regional associations of producers of crude oil or owners of royalty interests in crude oil. These organizations, together with the IPAA, represent essentially all of the 12,000 independent producers of crude oil and natural gas in the United States, together with several thousand royalty owners. The combined membership of the associations account for approximately 90% of the wildcat exploratory drilling in the United States, drill 80% of all wells in the United States, and have discovered more

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[6] See *infra* at 25-27.

[7] Harry Ptasynski, John Partridge, Berton W. Avery, Goldie Avery, Frederick S. Johnson, and Calvin Petroleum Corporation.

[8] A later suit filed by taxpayer appellee Partridge, covering taxes paid through the year 1980, was consolidated with the principal action. See J.S., App. A, 2a.

[9] The 30 associations are listed in the caption of the District Court's decision (J.S., App. A, 1a).

than 50% of the known crude oil and natural gas reserves in the United States. See Second Amended and Supplemental Complaint at paras. 4-5. The District Court found the association appellees to lack standing as plaintiffs, but ordered that they should remain as permissive intervenors.[10]

By its opinion and judgment of November 4, 1982, as amended, the District Court awarded refunds to the taxpayer appellees on the grounds that the Tax violated the Uniformity Clause. It held (J.S., App. A, 7a) that

> in each state where crude oil is found, the production and removal of that crude oil be subject to the tax and taxed at the same rate. The windfall profits tax ignores this requirement. The Act, on its face, says that one state, Alaska, is not subject to the same tax, at the same rate as all the other states. This is a clear violation of the constitutional requirement of uniformity.

The District Court then determined that the remedy must be an invalidation of Title I of the Crude Oil Windfall Profit Tax Act of 1980. Thus it rejected the Government's suggestion that it treat the Alaska exemption as "separable" and extend the Tax to the exempt portions of Alaska.[11] Recognizing that the separability issue turned on legislative intent, the District Court found (J.S., App. A, 9a) that it was "clear that the Alaska exemption was the result of negotiations and compromise, and that the Act as it exists today would not have been passed without the invalid Alaska provision."

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[10] In addition, the District Court granted motions to intervene by the States of Louisiana and Texas. See J.S., App. A, 2a.

[11] It also implicitly rejected the Government's alternative proposal that the court extend the exemption "to production in all areas similar to the Arctic Circle or located more than 75 miles from a pipeline connection." See Reply Brief for the Defendant United States of America and in Opposition to Motions for Summary Judgment, at 10.

ARGUMENT

The Windfall Profit Tax clearly violates the Uniformity Clause. In an unbroken line of cases dating from 1796 to the present, this Court has interpreted the Clause to require *geographic* uniformity. See *Hylton* v. *United States*, 3 U.S. (3 Dall.) 171, 180 (1796). In its classic formulation, the Court said that a tax complied with the Uniformity Clause only if "it operates with the same force and effect in every place where the subject of it is found." *Head Money Cases*, 112 U.S. 580, 594 (1884).[12] The Windfall Profit Tax is an excise tax covered by the Uniformity Clause, see Section 4986(a), and the Alaska exemption is geographically defined. The Government expressly concedes both points. J.S., 3, 17. Accordingly, the District Court's conclusion that the Tax "ignores [the uniformity] requirement" is inescapable. There is no need for elaborate briefing and oral argument on the Government's proposals that the Court now abandon a constitutional understanding that has served the country well for nearly 200 years.

Equally inescapable is the District Court's finding that "the Act as it exists today would not have been passed without the invalid Alaska provision." Every seriously considered bill either expressly, or by exemption of newly discovered oil, excluded much or all of the oil covered by the present exemption. The Alaska exemption was an integral part of the Congressional decision to extend the Tax to newly discovered oil. Persistent and effective Senate opposition to that extension gave way only when vehemently opposed Senate factions agreed on a package that included the Alaska exemption. The Government's suggestions that this Court rewrite the Tax—either by extending its burdens to Alaska or by judicially

[12] Only last term this Court held that the cognate requirement in the Bankruptcy Clause must not be watered down to a vague requirement of rationality. See *Railway Labor Executives Ass'n* v. *Gibbons*, 102 S. Ct. 1169, 1177 n. 11 (1982). The Government's effort to save the Tax requires the adoption of precisely such a "rational basis" test. See J.S., 17.

exempting newly discovered oil (see J.S., 26 n. 32)—are simply invitations to judicial legislation. There being no way of predicting exactly what adjustments Congress will make to conform the Tax to constitutional necessity, the conventional and appropriate remedy is to invalidate the Tax and to leave to Congress the policy judgments required for a cure.

I. The Alaska Exemption Violates the Uniformity Clause.

Article 1, Section 8, Clause 1 of the Constitution provides:

> The Congress shall have power to lay and collect Taxes, Duties, Imposts, and *Excises* . . . ; but all Duties, Imposts and Excises *shall be uniform throughout the United States*. (Emphasis added.)

The Windfall Profit Tax is an excise tax. See Section 4986(a). It is not geographically uniform throughout the United States. It is therefore invalid under the language of the Clause and an unbroken line of decisions by this Court.

A. This Court Has Consistently Interpreted the Uniformity Clause To Prohibit Purely Geographic Classificiations.

This Court has never deviated from the principle that the Uniformity Clause prohibits Congress from drawing tax classifications purely on the basis of geographic *location*. The Court has distinguished between geographic uniformity and "intrinsic" uniformity, *i.e.*, an identical *impact* on all sections of the country (as would be true only when the subject of taxation existed in equal proportions in all regions). While repeatedly rejecting claims that the Clause requires intrinsic uniformity, the Court has with equal regularity asserted its insistence on geographic uniformity.

The Court first interpreted the uniformity provision shortly after adoption of the Constitution. In *Hylton* v. *United States*, 3 U.S. (3 Dall.) 171 (1796), Justice Paterson[13] considered the

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[13] William Paterson had served as a delegate to the Constitutional Convention from New Jersey.

Clause and explained the Court's preference for classifying taxes so that they would be covered by the requirement of uniformity rather than that of apportionment.[14] He emphasized that, in contrast to the "endless valuations and assessments" necessary for apportionment,

> The rule of uniformity . . . implies certainty . . . The truth is, that *the articles taxed in one state should be taxed in another;* in this way the spirit of jealousy is appeased, and tranquility preserved; *in this way the pressure on industry will be equal in the several states*, and the relation between the different subjects of taxation duly preserved.

3 U.S. (3 Dall.) at 180 (emphasis added).

In the *Head Money Cases*, 112 U.S. 580 (1884), the Court clarified the proposition that the Uniformity Clause did not permit Congress to allocate the burden of taxes by reference to geographic boundaries. A tax, it said, complies with the Uniformity Clause only if "it operates with the same force and effect *in every place* where the subject of it is found." 112 U.S. at 594 (emphasis added).

In the Court's most complete discussion of the clause, *Knowlton* v. *Moore*, 178 U.S. 41 (1900), it again concluded that the Clause refers "purely to a geographical uniformity." 178 U.S. at 96. In its words, the Uniformity Clause requires

> that whatever plan or method Congress adopts for laying the tax in question, the same plan and the same method must be made operative throughout the United States; that is to say, that *wherever a subject is taxed anywhere, the same must be taxed everywhere throughout the United States, and at the same rate.*

Id. at 84 (emphasis added).

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[14] The taxpayer there claimed that a tax on carriages was "direct" and ought therefore to have been apportioned pursuant to Article I, Section 9, Clause 4. Instead the Court held the tax to be indirect and governed by the uniformity requirement of Article I, Section 8, Clause 1.

In subsequent cases, the Supreme Court has consistently held that the uniformity required is geographic uniformity. In *Florida* v. *Mellon*, 273 U.S. 12, 17 (1927), the Court stated that the Uniformity Clause requires "that the law shall be uniform in the sense that by its provisions the rule of liability shall be alike *in all parts* of the United States" (emphasis added), and in *LaBelle Iron Works* v. *United States*, 256 U.S. 377, 392 (1921), the court construed the Clause as requiring "territorial" uniformity. See also *Fernandez* v. *Wiener*, 326 U.S. 340 (1945).

The Windfall Profit Tax does not apply "everywhere throughout the United States." It thus violates the simple, straightforward requirement of geographic uniformity.

B. There is no support for the Government's contention that geographically discriminatory taxes are "uniform" if the non-uniformity has a "rational basis."

The Government persistently argues that geographic discriminations comply with the Uniformity Clause if they are supported by a "rational basis." J.S., 13-20 and especially 17. In the past term, however, this Court emphatically rejected a contention that would similarly have diluted the parallel uniformity requirement imposed on bankruptcy legislation by Article I, Section 8, Clause 4. *Railway Labor Executives Ass'n* v. *Gibbons*, 102 S. Ct. 1169 (1982). In the words of the Court, "the uniformity requirement of the Bankruptcy Clause is not an Equal Protection Clause for bankrupts." *Id.* at 1177 n.11.[15]

By the same token, nothing in the Court's treatment of the uniformity requirement of the Tax Clause suggests that it is merely an Equal Protection Clause for taxpayers.

The Government relies heavily on the fact that in the *Head Money Cases*, 112 U.S. 580 (1884), the Court upheld the challenged tax, which Congress had levied on alien passengers

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[15] The "rational basis" test proposed by the Government appears to be the test by which courts evaluate economic legislation for purposes of the Equal Protection Clause.

entering the United States by vessel. The Government notes that such a tax "could apply only in states having sea ports (a matter necessarily determined by considerations of their geography)." J.S., 16. But appellees have never questioned Congressional power to use tax classifications that have different consequences for different localities. Every term that Congress might use—oil, vessels, port, cold weather, etc.—would affect different regions in different ways. The *Head Money Cases*, and later Court decisions, clearly hold that the Uniformity Clause does not require "intrinsic uniformity." See the *Head Money Cases*, 112 U.S. at 594-95; *Knowlton* v. *Moore*, 178 U.S. 41, 84-109 (1900). Accordingly, if Congress should enact a provision exempting oil produced where specified climatic conditions are present, and if such conditions should exist in only one or in only a few states, there might be no successful challenge under the Uniformity Clause. Here, however, Congress has spoken in terms of express geographic boundaries. This the Uniformity Clause forbids.

Despite the Constitutional validity of differences in the geographic impact of taxes, this Court's historic disapproval of geographic non-uniformity involves more than "mere niceties of Congressional draftsmanship." J.S., 20. The Constitution's demand that Congress draft its tax classifications without reliance on purely geographic categories means that Congress will at least consider the issues in terms of genuine policy considerations, rather than naked political power. If, for example, there is a genuine concern in Congress over the Tax's disincentive to oil production in adverse climates, then, after invalidation of the Tax, Congress may wish to provide general exemptions for oil produced in areas that experience specified climatic conditions. Any such "cold weather" exemption would, of course, be likely to benefit areas of states other than Alaska; Wyoming and other mountain states, for example, would be likely to benefit. Even if the advantages of a "cold weather" exemption happened to affect only portions of Alaska, however, treatment of the issue in that form would naturally draw Congress on to consider whether other factors

accounting for high costs—such as production from offshore wells or from great depths—should also enjoy special relief.

The utility of barring Congress from reliance on purely geographic categories is illustrated, in the present Tax, by the incongruous relation between the Alaska exemption and the Tax's other solutions to the problem of high-cost oil. For example, the Tax's general solution to the problem is the "net income" limitation. 26 U.S.C. Section 4988(b).[16] Pursuant to that limitation, high-cost production in every other state is protected only to the extent that its costs and revenues meet the statutory prerequisites; but production from the exempt three-fourths of Alaska enjoys a free ride irrespective of actual costs and revenues.[17]

Another typically high-cost category is newly discovered oil, which, outside of Alaska, is placed in a preferentially treated tier but is still subject to substantial tax. See 26 U.S.C. Section

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[16] Pursuant to Section 4988(b), when the "windfall profit" is greater than 90% of "net income," the appropriate tax rate is applied to 90% of "net income" rather than to the "windfall profit."

[17] The Government's effort to sustain the Alaskan exemption by reference to high transportation costs between Alaska and mainland United States markets (J.S., 18-19) is simply in error. Mainland purchasers will not pay any premium for Alaskan oil; thus its price at the wellhead must be lower, by the amount of transportation costs, than the wellhead price of similar oil in the continental United States. For example, if transportation costs are $8 per barrel, and the wellhead price on the mainland is $28, the wellhead price for Alaskan oil will be $20. Since the "removal price" is in essence the wellhead price, application of the Act's established formula ("removal price" minus "adjusted base price" equals "windfall profit") *automatically reduces the "windfall profit"* from Alaskan oil by $8, without the need for any additional protection. See H. Rep. No. 304, 96th Cong., 1st Sess. 30 (1979), *reprinted at* 1980 U.S. Code Cong. & Ad. News 587, 612-13, for a recognition of the point.

4991(e). Alaska's newly discovered oil, by contrast, enjoys a superpreference—total exemption.[18]

The Constitutional insistence upon geographic uniformity is not, of course, any guarantee that tax classifications will be shaped by sound policy judgments rather than by the realities of political power. However, by making the exercise of the grosser, more unthinking forms of regional power politics marginally less convenient, it increases the likelihood of Congressional focus on genuine policy concerns. There is no reason for the Court to abandon that insistence now. Indeed, as the following section of this motion to affirm further indicates, the origins of the Alaskan exemption indicate that it represents precisely the sort of power play that the framers sought to avoid.

C. The Uniformity Clause is violated as much by statutes that *exempt* a geographic area in a single state as by ones that *tax* such an area.

The Government suggests that the Uniformity Clause is not violated unless " 'combinations' have drawn taxing legislation in such a way as to grant an 'undue preference' in favor of their own states or to impose an 'oppressive' discrimination against a minority." J.S., 17.[19] In fact, the origins of the Clause make

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[18] The Government's suggestion that the Alaskan exemption is just a convenient device for exempting newly discovered oil (J.S., 16-17) is completely without foundation and neatly obscures Alaska's superpreferential treatment.

[19] Insofar as the Government argues that the Clause prohibits only "undue preferences" and permits ones that are "due" or rationally sustainable, the argument is a rehash of its "rational basis" theory, discussed in part I.B. *supra*. Again, paraphrasing the pithy words of the Court in *Railway Labor Executives Ass'n* v. *Gibbons*, 102 S. Ct. 1169, 1177 n.11 (1982), the uniformity requirement of the Tax Clause is not an Equal Protection Clause for taxpayers.

The Government also appears to suggest that there is no violation of the Uniformity Clause because the "subject" of the tax is the enjoyment of a "windfall profit" by the owner of the economic interest

clear that the framers sought to prevent explicit regional discriminations of any sort—favorable or unfavorable. And this Court has so held.

In *Knowlton* v. *Moore*, 178 U.S. at 89-106, this Court reviewed the origins of the Clause. On August 15, 1787, Constitutional Convention delegates Carroll and Martin "expressed their apprehension . . . that, under the power of regulating trade, the general legislature might *favor* the ports of particular states . . . ." 178 U.S. at 103. They therefore moved the following proposition:

> 'The legislature of the United States shall not oblige vessels belonging to citizens thereof, or to foreigners, to enter or pay duties or imposts in any other State than in that to which they may be bound, or to clear out in any other than the State in which their cargoes may be laden on board; nor shall any privilege or immunity be granted to any vessel on entering or clearing out, *or paying duties or imposts in one State in preference to another.*'

5 *Elliot's Debates* 478, *quoted at* 178 U.S. at 103 (emphasis by the Court).

The proposed ban on preferences was referred to a committee, along with a suggested requirement of uniformity in duties and excises. The committee responded with a proposal that joined the language of preference and uniformity:

> 'nor shall any regulation of commerce or revenue *give preference to the ports of one State over those of another*, or oblige vessels bound to or from any State to enter, clear or pay duties, in another; and all *tonnage duties, imposts and excises*, laid by the legislature, *shall be uniform throughout the United States.*'

5 *Elliot's Debates* 483, *quoted at* 178 U.S. at 103-04 (emphasis by the Court.)

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in such oil. J.S., 17. The theory at which the Government hints would, if accepted, completely eliminate the uniformity requirement. Assuming, for example, that some owners of Florida orange groves are domiciled elsewhere, Congress would be free to levy an excise tax on production of Florida oranges.

Trivial additional changes occurred, and, evidently as a result of stylistic concerns, the port preference and the tax uniformity provisions were separated.[20] The Court concluded that the two provisions were aimed at exactly the same evil:

> It follows from the collocation of the two clauses that the prohibition as to preferences in regulations of commerce between ports and the uniformity as to duties, imposts and excises, though couched in different language, had absolutely the same significance.

178 U.S. at 104.

Thus the purpose of the Uniformity Clause, as well as of its forerunners in the constitutional deliberation, was to prevent Congress from making any explicitly regional differentiation, favorable or unfavorable, in its exercise of the tax power.

The Government purports to rely on an excerpt from Story's *Commentaries* for a completely ahistorical suggestion that the Clause merely limits majorities from imposing "oppressive" tax burdens on minorities (J.S., 13-14):

> The answer to the *** [uniformity requirement] may be given in a few words. It was to cut off all undue preferences of one state over another, in the regulation of subjects affecting their common interests. Unless duties, imposts and excises were uniform, the grossest and most oppressive inequalities vitally affecting the pursuits and employments of the people of different states might exist.

J. Story, *Commentaries on the Constitution of the United States*, § 957, at 673 (2d ed. 1851). In this passage, Justice Story seeks to *explain* the Uniformity Clause, not to *construe* it. Without the Uniformity Clause, he argues, "undue preferences" and "the grossest and most oppressive inequalities" might exist. In no way does he read the Clause as inviting the

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[20] The Uniformity Clause was attached as a qualification to the taxing power granted in Article I, Section 8, Clause 1, while the prohibition on preferences for any port remained with the prohibition on export duties, Article I, Section 9, Clause 5. See 178 U.S. at 104-5.

courts to review tax legislation for "oppression" or "undue" favoritism; he simply argues, as do appellees, that without the uniformity requirement the risk of such oppression is much increased.

There is, consistent with the framers' thinking, a fundamental identity between (1) regional preferences and (2) oppression. Where a majority of states seek to embark on an oppressive course by enacting taxes on a commodity produced in only a portion of the country, a regional preference may help further the majority's oppressive goal. By exempting a particular state, the majority can diffuse political opposition in that region. By denying such devices to Congress, the framers deliberately threw a roadblock in the way of biased taxing efforts.

Indeed, the Alaska exemption played just such a role in the formulation of the Windfall Profit Tax itself. When the Senate extended the tax to newly discovered oil—thus increasing its adverse effects on all oil-producing states—it simultaneously exempted Alaskan oil produced in all but a small area of Alaska. See 125 Cong. Rec. S18567 (daily ed. Dec. 14, 1979). The exemption was essential in obtaining the critical support of Senator Stevens of Alaska, the Acting Minority Leader, for the inclusion of new oil. See 125 Cong. Rec. S18564-65 (daily ed. Dec. 14, 1979).[21]

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[21] See Section II.C. *infra* for more details of the legislative trades.

The lopsided impact of the Tax reveals the advantage obtained by the non-producing states when they neutralized the previously intense Alaskan opposition. Oil production in just five states—Texas, Louisiana, California, Oklahoma and Wyoming—must bear approximately 60-65% of the total Windfall Profit Tax burden. The remaining 35-40% is spread over 28 other producing states with no one state's production bearing more than 3% and 17 states having no tax burden at all. Thus adoption of the Tax demonstrates the framers' wisdom in seeking to thwart majoritarian oppression by means of a prohibition against any geographic non-uniformity.

The origins of the Uniformity Clause, the observations of commentators such as Story, and a common sense appreciation of the risks of geographic non-uniformity all argue against the Government's proposed limitation on the Clause. This Court has never countenanced such a view; its frequently reiterated view that the Clause forbids geographic non-uniformity is not consistent with such a narrow construction. There is no basis for so limiting the Clause.[22]

D. Summary

As the Government notes (J.S., 13), no taxing statute has been held invalid on the grounds of violation of the Uniformity

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[22] The Government re-asserts in a footnote (J.S., 20 n.28) a vestige of the surprising ripeness argument that it made in the District Court but has evidently dropped here. In its present form the assertion is that there is no breach of the uniformity requirement because there was no production in the exempt areas of Alaska in the periods for which the taxpayer appellees sought refunds. (The period covered by the second suit filed by taxpayer Partridge (Civ. No. C82-0050, D. Wyo.) covers the period March 1 through December 31, 1980; production in the exempt regions of Alaska commenced on December 14, 1981. See Kye Trout affidavit of February 15, 1982, attached to Motion of Plaintiffs Partridge, Ptasynski, Avery, and Calvin Petroleum for Summary Judgment.) But taxpayer appellees have paid taxes pursuant to a statute that unconstitutionally distinguishes between their production and equivalent production in Alaska. The non-uniformity had immediate effects—the encouragement of investment in production in the exempt regions of Alaska. As such production has in fact commenced, it is clear that the unconstitutionality is not merely a linguistic matter, but one with real effect, giving illegal advantage to taxpayer appellees' competitors who are producing in Alaska. Ripeness is determined as of the time of judicial decision. See *The Regional Rail Reorganization Act Cases*, 419 U.S. 102, 139-40 (1974). The only effect of finding the tax to be uniform on the basis of this transformed ripeness argument would be to delay definitive resolution of the issue. The interests of defendant, appellees, and the public as a whole call emphatically for avoiding any such delay.

Clause until the decision below. The Government seems to regard that fact as supporting its argument that the Court should now supplant its 200-year old rule with some vague "rational basis" test. Quite the contrary, the 200 years of experience suggest the wisdom of continued adherence to the established rule. This is a constitutional success story, if ever there was one. For 200 years Congress has evidently been able to exercise its taxing power successfully without violating this straightforward prohibition. For the Court now to jettison the established understanding would only invite Congressional testing of the new line. The Court ultimately would have to (1) render the Clause superfluous (by equating it with the "rational basis" test applied to economic legislation under the Equal Protection Clause)[23] or (2) embark on a process of case-by-case review of each geographically non-uniform tax to see whether it contained enough of the evils feared by the framers to justify invalidation. Adherence to plain and long-established principle, however, will preserve the requirement's advantageous effects without in any way obstructing Congressional adoption of sound tax policy.

II. The Only Appropriate Remedy Is to Invalidate the Windfall Profit Tax; There Is No Authority for Judicial Imposition of Such a Tax on Alaska.

The District Court concluded that it was "clear that the Alaska exemption was the result of negotiations and compromise, and that the Act as it exists today would not have passed without the invalid Alaska provision." J.S., App. A, 9a. Accordingly, the Court concluded that it would be improper for a court to extend the Tax to the exempt portions of Alaska, and instead struck the Tax down. The District Court's reading of the Congressional intent is clearly correct. Judicial imposition of the Windfall Profit Tax on the exempt portions of Alaska

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[23] The Court has recently refused a similar invitation to eliminate the uniformity requirement of the Bankruptcy Clause. See *Railway Labor Executives Ass'n* v. *Gibbons*, 102 S. Ct. 1169, 1177 n.11 (1982).

would run counter to Congress's explicit, resolute decision in favor of exemption.

A. The principles governing separability support the District Court's decision.

The ability of a court to save an unconstitutional enactment by severing a portion of it depends upon whether the legislature would have enacted the statute without the provision sought to be severed. See, *e.g.*, *Zobel* v. *Williams*, 102 S. Ct. 2309, 2315 (1982); *Buckley* v. *Valeo*, 424 U.S. 1, 108 (1976); *Champlin Refining Co.* v. *Corporation Commission*, 286 U.S. 210, 234-35 (1932). See generally 2 *Sutherland, Statutory Construction*, § 44.04 (4th ed. C. Sands 1973) (hereinafter cited as "*Sutherland* §____").

In answering this question, the courts have looked to various factors, including whether the statute constitutes a single integrated scheme, whether the provision sought to be severed is a mere detail or an unimportant subsidiary portion of the statute, whether severance would defeat a dominant purpose of the statute, and whether Congress has expressly indicated its intent through aids to statutory construction such as the inclusion of a separability clause. See generally *Sutherland* §§ 44.04-44.11. Analysis of the Act and its legislative history in light of these factors compels the conclusion that Congress was firmly opposed to extension of the Tax to the exempt regions of Alaska. See part II. C. *infra*.

Two additional principles are highly relevant to the present case. First, the Court has been most reluctant to engage in severance when such action entails resolution of policy values committed by the Constitution to Congress and is therefore clearly legislative in nature. In *Marchetti* v. *United States*, 390 U.S. 39 (1968), for example, the Court refused a government invitation to save the occupational wagering tax by restricting the use of information thereby obtained. Explaining its refusal, the Court said:

> We cannot know how Congress would assess the competing demands of the federal treasury and of state gambling

> prohibitions; we are, however, entirely certain that the Constitution has entrusted to Congress, and not to this Court, the task of striking an appropriate balance among such values.

390 U.S. at 59-60. See also *Northern Pipeline Construction Co.* v. *Marathon Pipeline Co.*, 102 S. Ct. 2858, 2880 n.40 (1982).

The extreme range of the Government's proposed "severance" solutions—extending the tax to Alaska or creating an entirely new exemption for newly discovered oil (see J.S., 26 n.32)—clearly illustrates the legislative character of the decisions that it invites the Court to make. Moreover, the reasons for the Court's historic refusal to engage in judicial legislation are most forceful when the decision to sever would actually involve *imposition* of a tax on parties that Congress decided not to tax. A more purely legislative act than that suggested by the government is hard to imagine.

Second, this Court has emphatically recognized that when a tax scheme draws an unconstitutional distinction, the relief for the burdened taxpayer cannot be limited to a tax *increase* for those whom the legislature has unconstitutionally favored. In *Iowa-Des Moines National Bank* v. *Bennett*, 284 U.S. 239 (1931), holding that a state had violated the Equal Protection Clause by taxing the shares of a national bank more severely than those of similar state banks, the Court rejected the proposed remedy of modifying the statute to raise the tax rates for state banks. Writing for the Court, Justice Brandeis stated:

> The right invoked is that to equal treatment; and such treatment will be attained if either their competitors' taxes are increased or their own reduced. But it is well settled that a taxpayer who has been subjected to discriminatory taxation through the favoring of others in violation of federal law, cannot be required himself to assume the

> burden of seeking an increase of the taxes which the others should have paid.

284 U.S. at 247.[24] Severance of the Alaska exemption would, of course, burden taxpayers in precisely the way that Justice Brandeis said they must not be burdened.[25]

If this Court were to abandon the principle applied by Justice Brandeis in *Iowa-Des Moines National Bank* v. *Bennett*, it would put itself in the extraordinary position of judicially imposing a retroactive tax on oil producers who had invested in the exempt areas of Alaska in specific reliance on the Alaska exemption. Such a retroactive tax would raise serious Constitutional questions, even if done by Congress. See *Nichols* v. *Coolidge*, 274 U.S. 531, 542-43 (1927).

B. The Internal Revenue Code's general separability provision does not authorize judicial extension of the Windfall Profit Tax to Alaska.

The Government relies considerably on the general separability clause in the Internal Revenue Code, 26 U.S.C. Section 7852(a), which provides:

> If any provision of this title, or any application thereof to any person or circumstances, is held invalid, the remainder of the title, and the application of such provision to other persons or circumstances, shall not be affected thereby.

For two reasons Section 7852(a) cannot be said to authorize judicial extension of the Tax to the exempt regions of Alaska.

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[24] See also *Cumberland Coal Co.* v. *Board of Revision*, 284 U.S. 23 (1931); *Greene* v. *Louisville & Interurban Ry.*, 244 U.S. 499, 514-519 (1916); *Chicago Great Western Ry.* v. *Kendall*, 266 U.S. 94, 98 (1924); *Sioux City Bridge Co.* v. *Dakota County*, 260 U.S. 441 (1923).

[25] *Utah Power & Light Co.* v. *Pfost*, 286 U.S. 165 (1932), the Government's sole basis for asserting the opposite principle (see J.S., 25), indeed contains language contrary to the holding of *Iowa-Des Moines National Bank* v. *Bennett*, but the language is pure dictum.

First, Section 7852(a) is not aimed at enabling the courts to save discriminatory taxing statutes by taxing persons that Congress has elected not to tax. It is intended to save the Internal Revenue Code as a whole by authorizing the courts to excise provisions that unlawfully tax certain persons or circumstances. The "title" referred to in Section 7852(a) is Title 26, the Internal Revenue Code. The "invalid provision" in the instant case is the *Windfall Profit Tax by reason of its non-uniformity*. There is nothing invalid about a Congressional decision not to tax Alaskan oil; what is invalid is the imposition of a tax on oil in only 49 other states. The straightforward application of Section 7852(a), therefore, is to invalidate the Windfall Profit Tax.

This construction conforms to the precept laid down by Justice Brandeis in *Iowa-Des Moines National Bank* v. *Bennett*, 284 U.S. 239 (1931) (discussed in part II.A. *supra*), that the remedy for an unlawfully discriminatory tax is relief for the party wrongly taxed, not judicial taxation of those exempted. It is inconceivable that Congress, in a generally worded provision such as Section 7852(a), should have reversed that understanding and have authorized judicial imposition of taxes on exempt transactions.

Second, even if the general separability clause of the Code were applicable to the specific exemption contained in Title I of the Act, the clause would not require that the Court sever the Alaskan exemption rather than declare Title I unconstitutional. A separability clause is an aid in determining legislative intent, not an inexorable command.[26]

In *Williams* v. *Standard Oil Co.*, 278 U.S. 235 (1929), this Court made clear that a separability provision does no more than reverse the normal presumption that an act should stand or fall as a whole. Invalidation of the enactment as a whole is

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[26] *Railroad Retirement Board* v. *Alton Railroad Co.*, 295 U.S. 330 (1935); *Williams* v. *Standard Oil Co. of Louisiana*, 278 U.S. 235 (1929); *Dorchy* v. *Kansas*, 264 U.S. 286 (1924).

correct when the court finds a "clear probability that the invalid part being eliminated the Legislature would not have been satisfied with what remains." 278 U.S. at 242.

Moreover, where the separability clause relied on is a general separability clause in a pre-existing statute, its aid in determining legislative intent is very much weakened. As was pointed out in *Sutherland* § 44.11 at 356:

> [I]t is a reasonable inference that because a general act cannot control subsequent legislative intent and therefore is questionable evidence of it, less weight may attach to such a general rule of separability than to the clause in a separate act.

Even if a particularized separability clause were present, it would not permit the court to alter a statute in any way that would defeat the statute's dominant purpose. As the Supreme Court stated in *Railroad Retirement Board* v. *Alton Railroad Co.*,

> [N]otwithstanding the presumption in favor of divisibility which arises from the legislative declaration, we cannot rewrite a statute and give it an effect altogether different from that sought by the measure viewed as a whole.

295 U.S. at 362. There, the Court struck down the entire Railroad Retirement Act rather than sever provisions which were found to be necessary for the accomplishment of the act's dominant purpose. See also *McGinnis* v. *Royster*, 410 U.S. 263 (1973) (the removal of even a "subordinate" purpose may shift altogether the consensus of legislative judgment supporting the statute).

Thus, even if the literal terms of Section 7852(a) applied to the Alaska exemption, the necessary inquiry into legislative purposes would remain. That history shows not just the "clear probability" but the certainty that Congress would not have adopted the Tax in its present form without the Alaskan exemption.

C. The legislative history of the Act demonstrates a resolute Congressional intention that the Tax should not apply in the exempt parts of Alaska.

An analysis of the history of the Act reveals Congressional assertion of six major objectives: (1) the encouragement of domestic production; (2) reducing U.S. dependence on imported oil; (3) the generation of tax revenues; (4) the encouragement of energy conservation; (5) punishing domestic oil producers for some undefined conduct; and (6) the granting of low income energy assistance. The legislative history is replete with references to the balance struck in the Act among these competing goals.[27]

The Alaskan exemption was seen by Congress as being an integral part of this scheme, and in particular, as being an important part of the balance struck between the interest in enhanced domestic production and the generation of tax revenues. As was pointed out in the House Ways and Means Committee Report on an earlier version of the bill:

> To provide the appropriate production incentives, the bill provides special treatment for newly discovered oil, certain Alaskan oil, and incremental oil production from qualified tertiary recovery projects . . . .
>
> . . . .
>
> . . . [A] relatively heavy tax on tier one and tier two oil, along with the *more lenient treatment of* newly discovered, *Alaskan* and tertiary *oil, strikes the appropriate balance between revenue needs and production incentives.*

H.R. Rep. No. 304, 96th Cong., 1st Sess. 14 (1979), *reprinted in* 1980 U.S. Code Cong. & Ad. News 587, 600 (emphasis added).

[27] See, *e.g.*, 126 Cong. Rec. H1834 (daily ed. Mar. 13, 1980) (remarks of Rep. Ullman); 126 Cong. Rec. S2630 (daily ed. Mar. 19, 1980) (remarks of Sen. Gravel); 126 Cong. Rec. S2855 (daily ed. Mar. 24, 1980) (remarks of Sen. Baucus).

The Senate Finance Committee Report also emphasized the concern over enhanced domestic energy production:

> The ultimate solution to the energy problem does not lie in taxing energy producers or simply in helping people cope with higher prices; it lies in reducing our consumption of energy and in *increasing domestic energy production*. A very important part of the Committee substitute is a program of tax incentives designed to achieve these goals.

S. Rep. No. 394, 96th Cong., 1st Sess. 7 (1979), *reprinted in* 1980 U.S. Code Cong. & Ad. News 410, 418 (emphasis added).

The Alaskan exemption was a key element of the compromise based on the concern over incentives for increased domestic production. The importance of Alaska as an oil producing state was frequently emphasized. In debates it was pointed out that Alaska supplied approximately fifteen percent of domestic oil currently being produced, that Alaska produced roughly 1 out of 6 barrels per day, and that 800 million barrels of known reserves still remained in the west (exempt) end of the Sadlerochit Reservoir.[28] In addition to known reserves in Prudhoe Bay, Senate discussions noted the discovered but as yet unproven reserves in the Kuparuk and Lisburne formations. 125 Cong. Rec. S17715 (daily ed. Dec. 4, 1979) (remarks of Sen. Bradley). In general, Congress believed that there was a tremendous amount of oil yet to be produced in Alaska and that this oil should be exempt from the Tax.[29]

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[28] 126 Cong. Rec. H1842-43 (daily ed. Mar. 13, 1980) (remarks of Rep. Young); 125 Cong. Rec. S17666 (daily ed. Dec. 3, 1979) (remarks of Sen. Stevens). Current United States government estimates of the reserves in the exempt portions of the Sadlerochit Reservoir (*i.e.*, the portion of that reservoir outside Prudhoe Bay) are now nearly double the figure used by Senator Stevens. See Statement *supra*.

[29] See 125 Cong. Rec. S18137 (daily ed. Dec. 10, 1979) (remarks of Sen. Long); 126 Cong. Rec. S2772 (daily ed. Mar. 20, 1980) (remarks of Sen. Bellmon).

Recognizing that the Tax would have a detrimental impact on production, Congress sought by the Alaska exemption to minimize its effect on this special area, which it viewed as peculiarly promising. The Joint Explanatory Statement of the Committee of Conference, which was the result of the compromise between the House and Senate delegates, reflects the concern that without an exemption from the tax, the important oil producing regions in Alaska would not be developed:

> The exemption of Alaskan oil production for the designated locations reflects the concern of the conferees that taxation of this production would discourage exploration and development of reservoirs in areas of extreme climatic conditions.

H. Conf. Rep. No. 817, 96th Cong., 2d Sess. 103, *reprinted in* 1980 U.S. Code Cong. & Ad. News 642, 656.

The legislative history of the Alaska exemption demonstrates its integral relation to the legislative judgment to apply the Tax to newly discovered oil. In one form or another, the exemption persisted through every stage of the Tax's evolution. The House Ways and Means Committee bill covered new oil but exempted Alaskan oil produced north of the Arctic Circle except for the Sadlerochit reserves already in production. H.R. Rep. No. 304, 96th Cong., 1st Sess. 30, *reprinted in* 1980 U.S. Code Cong. & Ad. News 586, 612-13. The Senate Finance Committee bill exempted all newly discovered oil. S. Rep. No. 394, 96th Cong., 1st Sess. 35-37, *reprinted in* 1980 U.S. Code Cong. & Ad. News 410, 444-446. This mooted any question of an Alaskan exemption, for any Alaskan production (other than from the portion of the Sadlerochit reservoir in the Prudhoe Bay field) would have qualified as newly discovered.

The Senate decision to extend the Tax to newly discovered oil and to exempt Alaskan production was a single, integrated decision. It was, in essence, a decision to tax newly discovered oil in 49 states. That decision played a vital role in the resolution of a stalemate that had developed between those who sought to extend the tax and those opposed, either to the tax as a whole or to its extension. It was the heart of the essential compromise that paved the way for adoption of the Tax.

Debate on the Tax bill had begun on November 15, 1979, but, starting as early as December 3, 1979, the official record of the Senate debate contains allusions to intensive behind-the-scenes negotiations between these forces.[30] To maintain the pressure on the negotiators, the Majority Leader, Senator Byrd of West Virginia, frequently kept the Senate in session into the evening. Allusions to threatened or actual delaying actions were frequent, as was evidence of such action.[31] Senator Long indicated that the committed resistance of a single Senator might jeopardize passage of *any* bill. 125 Cong. Rec. S18041 (daily ed. Dec. 7, 1979). Cloture votes were threatened, then delayed. See 125 Cong. Rec. S18039-42, S18052 (daily ed. Dec. 7, 1979) (remarks of Senators Byrd, Long, and Dole).

Finally, on December 14, 1979, the logjam broke. The major participants in the behind-the-scenes negotiations arrived at a compromise, pursuant to which the Senate extended the Tax to "newly discovered oil (other than newly discovered oil produced north of the Arctic Circle)." See 125 Cong. Rec. S18564 (daily ed. Dec. 14, 1979)(Amendment No. 877 as modified), adopted at S18567 (Dec. 14, 1979).

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[30] See, *e.g.*, 125 Cong. Rec. at S17688 (daily ed. Dec. 3, 1979) (remarks of Sen. Byrd); S17707 (daily ed. Dec. 4, 1979) (remarks of Sen. Byrd) and S18509 (daily ed. Dec. 14, 1979) (remarks of Sen. Boschwitz).

[31] See, *e.g.*, 125 Cong. Rec. at S17707 (daily ed. Dec. 4, 1979) (Sen. Stevens, indicating readiness to withhold otherwise appropriate unanimous consents); S17707-17708 (daily ed. Dec. 4, 1979)(Sen. Byrd, asserting desire to avoid filibuster); S17805 (daily ed. Dec. 5, 1979)(Sen. Dole, threatening a "long debate" if proposed amendment restricting percentage depletion were passed); S17932 (daily ed. Dec. 6, 1979) (tabling of amendment on "bracket creep" in income tax); S18136 (daily ed. Dec. 10, 1979) (defeat of amendment to limit federal budget as a percentage of gross national product); and S18039-41 and S18050-51 (daily ed. Dec. 7, 1979) (allusions by Senators Byrd, Long and Dole to the problem of non-germane amendments).

Throughout the extensive negotiations Senator Stevens of Alaska, the Acting Minority Leader, played a significant role. See 125 Cong. Rec. S18564, S18565 (daily ed. Dec. 14, 1979) (expressions of appreciation by Senators Dole and Nelson to Senator Stevens for his work on the compromise). In expressing his reluctant approval of the compromise measure, he stated his flat opposition to any further amendment that would increase the tax on Alaskan oil. 125 Cong. Rec. S18565 (daily ed. Dec. 14, 1979). The timing, the key role of Senator Stevens, and Senator Stevens's unequivocal position opposing taxation of newly discovered Alaskan oil, all indicate that without the Alaska exemption the tax would at least have exempted newly discovered oil.

The Alaska exemption was thus an integral part of the compromises necessary to secure final passage of the Act. Its removal would effectively "mutilate" the work of Congress. See *Williams* v. *Standard Oil Co.*, 278 U.S. 235, 242 (1929).

The Government lays great stress upon selected portions of some observations made by Senator Long on the floor of the Senate. (J.S., 23-24.) Senator Long at one point declared that should the courts find that the Alaskan exemption violates the Uniformity Clause of the Constitution, "that provision should be regarded as a nullity and . . . Alaska will pay the same 30-percent tax on new oil as everybody else." 126 Cong. Rec. S3056 (daily ed. Mar. 26, 1980) (remarks of Sen. Long). Even if this were Senator Long's intent, however, the intent of Congress as a whole is quite a different matter. See *American Smelting and Refining Company* v. *Occupational Safety and Health Review Commission*, 501 F.2d 504, 509 (8th Cir. 1974). There was neither a debate nor vote on the issue of separability, and no separability clause was inserted in this Act. No thought similar to Senator Long's was expressed by any other Senator or in the House of Representatives. No Senator reacted in any way to Senator Long's observations. No committee report referred in any way to separability.

Moreover, Senator Long himself acknowledged that Congress would not be satisfied with the Act without the exemp-

tion. He noted that as a result of severance, Alaska would pay the same 30 percent tax as everybody else, but stated that "if that were to be the case we would expect to act in the future to remedy this and to try to provide some consideration based on the cost of transportation and the high cost of developing oil and producing oil in those areas north of the Arctic Circle, and those areas that are far removed from the pipeline or any kind of feasible water transportation." 126 Cong. Rec. S3056 (daily ed. Mar. 26, 1980).

In other words, even for Senator Long the Tax without the Alaska exemption could not stand in the form adopted. Taken as a whole, his statements reflect his recognition that the *specific circumstances* justifying a judicial decision to sever were absent in this instance.[32]

The legislative history of the Windfall Profit Tax thus shows that Congress would not have been satisfied with the Tax had it not included the Alaskan exemption. The major goal intended by Congress, the reconciliation of the Act's revenue-raising purpose with concern over excessive disincentives to domestic energy production, cannot be effected if the legislative balance is disrupted through elimination of the Alaskan exemption.

D. Summary

There is simply no way for the Court to gauge what form the Tax would have taken in the absence of the Alaskan exemption. The extraordinary range of alternatives that the Government proposes in the name of separability—extension of the Tax to Alaska, judicial creation of an exemption for newly discovered oil—demonstrate the haphazard character of any such venture into judicial legislation. Rather than indulge in hopeless guesswork, the Court should affirm the District

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[32] Indeed, perhaps because of that recognition, Senator Long has since publicly expressed his view that the entire Tax should be invalidated. See *The Shreveport Times* (November 25, 1982), p. 25, col. 2.

Court's invalidation of the Tax, leaving to Congress the task of remedial surgery.

CONCLUSION

Summary affirmance of the District Court decision is appropriate. When a Constitutional provision has enjoyed a plain meaning for 200 years, and has in no way thwarted Congressional development of sound tax policy, there is no need for briefing and oral argument on the Government's proposal that the Uniformity Clause be transformed into an Equal Protection Clause for taxpayers.

Nor do the Government's proposed "severance" remedies require any extended consideration. Either taxation of production that Congress has most emphatically decided to exempt, or definition of a whole new exemption for newly discovered oil, would be wholly inappropriate judicial legislation. As the first option would involve retroactive taxation of oil producers who have invested several hundred million dollars in production in the exempt areas of Alaska in specific reliance on the exemption, it would raise serious additional Constitutional questions.

In order that Congress may quickly get on with the task of effecting a cure, and that taxpayers may soon have a firm basis

for planning, the Court should summarily affirm the decision of the District Court.

Respectfully submitted,

HAROLD B. SCOGGINS, JR.*
Independent Petroleum
Association of America
1101 16th Street, N.W.
Washington, D.C. 20036
(202) 857-4731
Attorney for Association Appellees

OF COUNSEL:

DR. FRANK CONKLIN
17605 E. Montgomery
Green Acres, WA 99106

GARY RANDALL
Professor of Law
Gonzaga University
Box 3528
Spokane, WA 99220

WILLIAM H. BROWN
MICHAEL J. SULLIVAN
BROWN, DREW, APOSTOLOS,
MASSEY AND SULLIVAN
500 Petroleum Building
Casper, Wyoming 82601

STEPHEN F. WILLIAMS
ROBERT NAGEL
Professors of Law
University of Colorado
School of Law
Campus Box 401
Boulder, Colorado 80309

MICHAEL BOUDIN*
LEONARD R. STEIN
1201 Pennsylvania Avenue, N.W.
P. O. Box 7566
Washington, D.C. 20044
(202) 662-5286
Attorneys for Taxpayer Appellees

**Counsel of Record*

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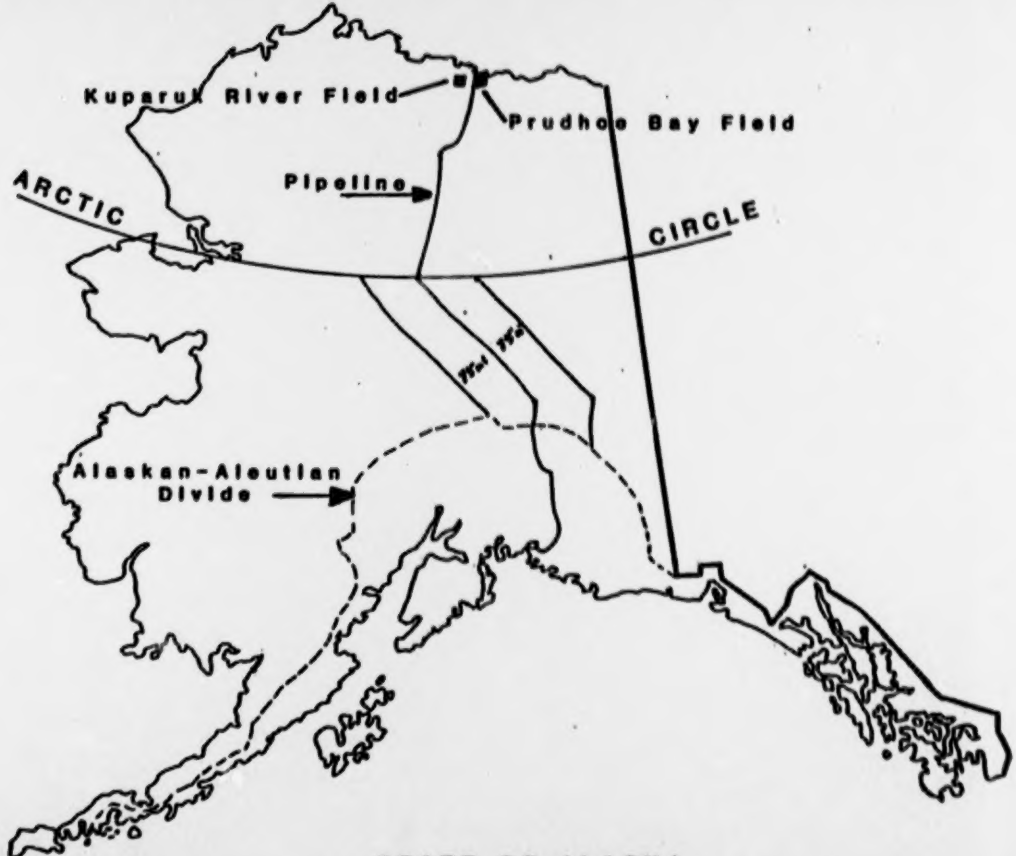
APPENDIX A



STATE OF ALASKA

APPENDIX B

TECHNICAL CORRECTION AMENDMENTS

The Technical Corrections Act of 1982, Pub. L. No. 97-448, 96 Stat. 2365, amends Section 4994(e) to read as follows:

(e) Exempt Alaskan Oil.—For purposes of this chapter, the term 'exempt Alaskan Oil' means any crude oil (other than Sadlerochit oil) which is produced—

(1) from a well located north of the Arctic Circle or from a reservoir from which oil has been produced in commercial quantities through such well, or

(2) from a well located on the northerly side of the divides of the Alaska and Aleutian ranges and at least 75 miles from the nearest point on the Trans-Alaska Pipeline system.